

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the MnDOT Detroit Lakes  
Regional Headquarters, Construction  
Project Number 00TZ1791B

**SIXTH PREHEARING ORDER  
ON MOTION FOR SUMMARY  
CERTIFICATION TO THE AGENCY**

The above-entitled matter came before Administrative Law Judge Eric L. Lipman upon the Minnesota Department of Transportation's March 23, 2009 Motion for Certification ("MnDOT").

Thomas R. Revnew and Michael L. McCain, Seaton, Beck & Peters, P.A., appeared on behalf of Comstock Construction, Inc. ("Comstock"). Michael A. Sindt, Assistant Attorney General, appeared on behalf of MnDOT. Steven M. Gunn, Deputy Attorney General, appeared on behalf of Minnesota Department of Labor and Industry ("DOLI").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

**IT IS HEREBY ORDERED THAT:**

1. DOLI's Motion for Certification is DENIED.

Dated: April 20, 2009

/s/ Eric L. Lipman  
ERIC L. LIPMAN  
Administrative Law Judge

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On or about August 17, 2000, Comstock and MnDOT entered into a contract that provided for additions to, and remodeling of, MnDOT's Detroit Lakes Regional Headquarters. The contract required Comstock to provide employees who worked on the project wages and benefits that were consistent with Minn. Stat. §§ 177.41 - 177.44.

On August 10, 2006, MnDOT issued a determination as to the amount of prevailing wages owed by Comstock. It claims that Comstock owes \$111,428.11 in additional wages for prevailing wage violations.<sup>1</sup>

On October 10, 2006, Comstock requested a contested case hearing as to these claims.<sup>2</sup> The Notice and Order for Hearing was issued by MnDOT on December 4, 2006.<sup>3</sup>

By way of papers filed on September 21, 2007, Comstock sought summary disposition on MnDOT claims for additional wages. Comstock argued that MnDOT's claims were based upon: (1) rights to recovery that are barred by the doctrine of laches; (2) arbitrary and capricious government actions; (3) unauthorized rulemaking by MnDOT or the Minnesota Department of Labor and Industry ("DOLI") and (4) unconstitutionally vague rules.<sup>4</sup>

On February 7, 2008, the undersigned recommended that the Commissioner of Transportation grant-in-part and deny-in-part Comstock's Motion for Summary Disposition.<sup>5</sup>

Thereafter, the parties filed written exceptions to the undersigned recommendations and an oral argument was held before Deputy Commissioner Khani Sahebjam, of the Minnesota Department of Transportation.

On October 10, 2008, Deputy Commissioner Sahebjam rejected the February 7, 2008 recommendations and remanded this matter to OAH for additional proceedings. The remand order included the directive to develop the hearing record "on the following issues":

(1) "Does MN/DOT have legal authority to enforce the prevailing wage requirements for the Detroit Lakes Regional Headquarters, Construction Project Number OOTZ1791B;"

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<sup>1</sup> *In the Matter of the MnDOT Detroit Lakes Regional Headquarters*, Recommendation on Motion for Summary Disposition, OAH Docket No. 8-3001-17706-2 at 4 (February 7, 2008).

<sup>2</sup> Notice of and Order for Hearing, at 3.

<sup>3</sup> *Id.*, at 5.

<sup>4</sup> Recommendation on Motion for Summary Disposition, *supra*, at 1 and 10.

<sup>5</sup> *Id.*, at 8.

(2) “Based upon consideration of all the evidence in the record and the testimony of experts and other witnesses, what tasks do the disputed Master Job Classifications encompass and how should the workers who performed the tasks of installing waterproofing, providing tools to Cement Masons, helping painters, typing rebar, erecting chain link fences and installing Venetian blinds be classified;” and,

(3) “Based on the classifications determined, how much if any, in back wages does Comstock owe its employees”?<sup>6</sup>

At a December 18, 2008 telephone Prehearing Conference, the parties discussed the scheduling of proceedings on Comstock’s second motion for summary disposition. Briefing on this motion occurred in early 2009 and oral argument on the motions was held on February 9, 2009.

By way of a *Fifth Pre-Hearing Order* issued on February 25, 2009, the undersigned denied Comstock’s second motion for Summary Disposition and entered a set of dates for the completion of filings in advance of an evidentiary hearing in June of 2009. As part of the Memorandum to this Order, the Administrative Law Judge observed:

During the oral argument on the instant motions, it was suggested by counsel for MnDOT that the range of issues to be addressed at the upcoming evidentiary hearing may be broader than the three listed in the Deputy Commissioner’s remand Order of October 10, 2008. Given the Commissioner’s description of “the following issues” in his Order, the Administrative Law Judge is doubtful that the instructions for OAH on remand are broader than the listed items. If MnDOT is of a different view, the Administrative Law Judge urges it to make an early filing of a Motion in Limine or a request for certification under Minn. R. 1400.7600, so as to avoid a delay in the commencement of the evidentiary hearing.

On March 23, 2009, this Office received MnDOT’s Motion for Certification. No other party filed responsive pleadings within the 10-working day provided by rule, or thereafter.

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<sup>6</sup> *In the Matter of the MnDOT Detroit Lakes Regional Headquarters*, Findings of Fact, Conclusions and Order of the Commissioner of Transportation, OAH Docket No. 8-3001-17706-2, at 8 (October 10, 2008).

## MEMORANDUM

Pointing to that portion of the remand Order in which the Commissioner inquired “[b]ased upon consideration of all the evidence in the record and the testimony of the experts and other witnesses, what tasks do the disputed Master Job Classification encompass,” MnDOT seeks to present evidence on the proper constriction of a wider range of job classifications than those associated with “installing waterproofing, providing tools to Cement Masons, helping painters, typing rebar, erecting chain link fences [or] installing Venetian blinds.”<sup>7</sup>

Minnesota Rule 1400.7600 sets out the six factors to be weighed in determining whether a motion should be certified. Those factors are:

- (A) whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or
- (B) whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or
- (C) whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or
- (D) whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or
- (E) whether it is necessary to promote the development of the full record and avoid remanding; or
- (F) whether the issues are solely within the expertise of the agency.

Urging that it be permitted to introduce evidence on a wider range of classifications than are referenced on page eight of the remand Order, MnDOT argues:

This language allows for a hearing process where the parties may present testimony as to all the various tasks performed by Comstock employees in the construction of Detroit Lakes Regional Headquarters. The purpose of the hearing is to establish a complete record that analyzes the tasks performed by each classification assignment in dispute and what back wages, if any, are owed. The tasks performed on the project are not limited to those listed in Section 2B of the Deputy Commissioner’s Order of October 10, 2008.

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<sup>7</sup> Compare, *In the Matter of the MnDOT Detroit Lakes Regional Headquarters*, Findings of Fact, Conclusions and Order of the Commissioner of Transportation, OAH Docket No. 8-3001-17706-2, at 8 with DOLI Request for Certification, at 2.

The list of tasks that are currently in the record exceeds the tasks listed in the order. Also attached is the Notice of Hearing. These documents demonstrate that OCIC intend to enforce the State Prevailing Wage Act on all disputed aspects of the Detroit Lakes Regional Headquarters project.<sup>8</sup>

The Administrative Law Judge agrees. To the extent that evidence as to the scope of disputed classifications which do not involve “installing waterproofing, providing tools to Cement Masons, helping painters, typing rebar, erecting chain link fences [or] installing Venetian blinds,” is necessary to answer the Commissioner’s third inquiry – namely, “how much if any, in back wages does Comstock owe its employees” – such evidence is proper for inclusion into the evidentiary hearing record.

Yet, because it is clear from the Commissioner’s remand Order that a complete record as to what, if any, amounts in back wages Comstock owes its employees, is requested in this matter, certification of the question that MnDOT presents in its March 23, 2009 Motion is not warranted.

**E. L. L.**

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<sup>8</sup> DOLI Request for Certification, at 2 (citations omitted).